

BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

THIS DECISION DESIGNATES FORMER BENEFIT
DECISION NO. 6596 AS A PRECEDENT
DECISION PURSUANT TO SECTION
409 OF THE UNEMPLOYMENT
INSURANCE CODE.

In the Matter of:

JACK SILVER
(Claimant-Respondent)

PRECEDENT
BENEFIT DECISION
No. P-B-217

FORMERLY BENEFIT DECISION No. 6596

S.S.A. No.

THRIFTY DRUG STORES CO., INC.
(Employer-Appellant)

Employer Account No.

STATEMENT OF FACTS

The employer appealed from Referee's Decision No. LA-73108 which held the claimant not subject to disqualification for unemployment compensation benefits under the provisions of section 1256 of the Unemployment Insurance Code, and that the employer's account was not relieved of benefit charges, on the ground that the claimant was discharged for reasons other than misconduct connected with his most recent work. The case was remanded for an additional hearing and the transcripts of both hearings are before us for review.

The claimant was employed by this employer as a registered pharmacist on December 5, 1957. He last worked on January 11, 1959 and was scheduled to next work on January 14, 1959. However, he did not report for work on that day because he had been apprehended and jailed by the police on a charge of illegal possession of narcotics, a felony under section 11500 of the Health and Welfare Code (now section 11350 of the Health and Safety Code), because of the discovery of various narcotics in the claimant's home. On January 17, 1959, the claimant was released on bond. He reported to

work on January 18, 1959, but was informed by his supervisor that he was suspended until the outcome of his arrest was known. On or about February 22, 1959, the claimant was interviewed by the employer. The claimant admitted to the illegal possession of narcotics and immediately following the interview, the employer determined to discharge the claimant. The claimant's name was removed from the payroll records; however, he was never advised of this action by the employer. The claimant thereafter filed his claim for unemployment compensation benefits effective March 8, 1959.

On May 29, 1959, the claimant was found guilty of violation of section 11500 of the Health and Safety Code (now section 11350 of the Health and Safety Code) for illegal possession of narcotics. He was sentenced on June 16, 1959 but was granted probation.

The employer terminated the claimant's employment because it was felt that the publicity attendant to the arrest of the claimant was detrimental to the employer's interest. The employer contended that the claimant's termination of employment should be viewed as a constructive voluntary leaving of work because the employer's records indicated that the claimant ". . . In effect voluntarily terminated his employment with our company due to incarceration."

REASONS FOR DECISION

Under section 1256 of the Unemployment Insurance Code a claimant is subject to disqualification and under sections 1030-1032 of the code an employer's reserve account may be relieved of benefit charges if it is found that the claimant left his most recent work voluntarily without good cause or was discharged for misconduct connected with his most recent work.

It is first necessary to decide if the claimant voluntarily left his work or was discharged by the employer. In applying the provisions of section 1256 of the code, the situation must be judged at the time of termination of employment (Benefit Decision No. 6054).

The record shows that on January 18, 1959 the claimant reported to work ready, willing and able to perform the duties of his job. The employer did not

permit him to commence work and suspended him, which suspension was later changed by the employer to a discharge. Under these conditions it is held that the employer was the moving party in the separation and therefore the claimant's termination of employment must be viewed as a discharge by the employer (Benefit Decisions Nos. 6209 and 5439).

So holding, it is necessary to decide if the claimant was discharged for misconduct connected with the work.

We have consistently followed the definition of misconduct as construed by the Wisconsin Supreme Court in Boynnton Cab Co. v. Neubeck (1941), 237 Wis. 249, 296 N.W. 636, wherein the court stated:

" . . . The term 'misconduct', as used in (the disqualification provision) is limited to conduct evincing such wilful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to his employer. On the other hand, mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances or good faith errors in judgement or discretion are not to be deemed 'misconduct' within the meaning of the statute."

We have also consistently followed the rule, which is likewise followed by a majority of other state unemployment insurance jurisdictions, that an act which occurs while the worker is off duty and which is not related to his employment is not misconduct "connected with his work." Thus we have held, for example, that the disqualifying provisions were not applicable to :

a janitor employed at an Air Force base who was convicted of drunken driving while off duty (Benefit Decision No. 6534); an assembler employed at an aircraft plant who was arrested on a morals charge for an event which occurred away from work (Benefit Decision No. 5439); or a leadman in a manufacturing plant who, although previously warned against gambling activities on the employer's premises during working hours, was discharged for admitted gambling away from work during a leave of absence (Benefit Decision No. 5193). However, in Benefit Decision No. 5864, we considered the case of a claimant who had been discharged from her position as a bookkeeper in a bank for persisting in the practice of drawing personal checks against her account at times when there were insufficient funds therein to cover. In arriving at the conclusion that the claimant's conduct tended to substantially injure the employer's interest and constituted misconduct in connection with her work, we reasoned that the financial integrity of a bank employee should be above question and that it also could be taken for granted that questionable financial transactions on the part of a bank employee reflected on the integrity of the employer. Similar exceptions to the general rule that off-duty activities do not constitute misconduct "connected with" the work have been made in other jurisdictions where the claimant deals with the public on behalf of the employer and, when off duty, becomes involved through fault of his own in a disgraceful situation which can reflect upon and adversely affect the employer's welfare (See, e.g., Arizona, App. Trib. Dec. 4785 (CCH Un. Ins. Serv., Arizona, Par. 8229.12); Massachusetts Bd. of Rev. Dec. No. 5292, Mass. RE. (CCH Un. Ins. Serv., Mass. Par., 1970.651); North Dakota App. Trib. Dec. No. AT-4331-56 (CCH Un. Ins. Serv., N. Dakota, Par. 8221); West Virginia Bd. of Rev. Dec., Case No. 9512-C (CCH Un. Ins. Serv., W. Virginia, Par. 8183.05)).

In the present case, the claimant was a registered pharmacist who, because of his occupation, was aware of the laws governing the possession of narcotics and was serving the public on behalf of the employer in a position of trust which called for the preparation and sale of drugs and narcotics upon prescription. This was a position which placed the health and, at times, even the life of the employer's customers under the claimant's control. As such, it was imperative and vital to the employer's interests that the public have complete faith and confidence in the employer's pharmacy. Such faith and confidence was, of course, largely dependent

upon those individuals who represented the employer in its dealings with the public. Here, we are of the opinion that the claimant's illegal possession of narcotics was an offense which was so closely related to his occupation with the employer as to destroy his suitability for employment as a pharmacist in the employer's establishment and that the offense constituted misconduct in connection with his work. Therefore, we conclude that the claimant is disqualified for benefits under section 1256 of the Unemployment Insurance Code for a period of five weeks, as provided in section 1260 of the code, and that the employer's account shall be relieved of charges under section 1032 of the code.

DECISION

The decision of the referee is reversed. The claimant is disqualified for benefits under section 1256 of the code for a period of five weeks as provided in section 1260 of the code and the employer's account is relieved of charges.

Sacramento, California, February 5, 1976.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

DON BLEWETT, Chairperson

MARILYN H. GRACE

CARL A. BRITSCHGI

RICHARD H. MARRIOTT

DISSENTING - Written Opinion Attached

HARRY K. GRAFE

DISSENTING OPINION

I dissent.

This decision is of dubious precedent value for a number of reasons. Largely, it is based on outdated statutes and it fails to recognize pronouncements of the courts. Although the decision proclaims that "the transcripts of both hearings are before us for review" nothing could be further from the truth. The record in this and all other Benefit Decisions being elevated to precedent status have long since been destroyed and are not available to us (see my dissenting opinion in Appeals Board Decision No. P-B-168). The lack of the record is especially critical in view of the issues of this case.

The claimant here was employed in a drug store as a pharmacist. On January 14, 1959 he was arrested "on a charge of illegal possession of narcotics, a felony" under Health and Safety Code (identified by the Board at that time as the "Health and Welfare Code") section 11500. The claimant remained in jail until released on bail on January 17, 1959. He reported for work on January 18, but was suspended for having missed four days' work because of his confinement in jail. The claimant was convicted on May 29, 1959 of "illegal possession of narcotics" and was subsequently granted probation. The employer contended that the claimant's incarceration constituted a constructive quit.

Assuming for the moment the contemporary truth of the foregoing recital of facts from the majority opinion, this case today would be disposed of pursuant to subdivision (a) of section 1256.1 of the Unemployment Insurance Code, as added in 1968 and amended in 1972:

"(a) If the employment of an individual is terminated due to his absence from work for a period in excess of 24 hours because of his incarceration and he is convicted of the offense for which he was incarcerated or of any lesser included offense, he shall be

deemed to have left his work voluntarily without good cause for the purposes of section 1256. A plea or verdict of guilty, or a conviction following a plea of nolo contendere, is deemed to be a conviction within the meaning of this section irrespective of whether an order granting probation or other order is made suspending the imposition of the sentence or whether sentence is imposed but execution thereof is suspended."

All of the elements of section 1256.1(a) appear to be satisfied. The claimant was absent from work for a period in excess of 24 hours by reason of incarceration; he was later convicted of the charge upon which the arrest was based; and he was terminated because of his absence resulting from incarceration. Consequently, the claimant, today, would be held to have left his work voluntarily without good cause within the meaning of section 1256. This being dispositive of the matter, the Reasons for Decision become meaningless surplusage.

But there are far deeper issues involved in this matter, which demand examination and discussion. Assuming that the discharge was not founded on the claimant's absence from work because of incarceration, it is necessary to evaluate the conduct of the claimant within the meaning of section 1256. For this purpose, it is presupposed that the claimant was discharged for his admission to the employer of the truth of the charges against him.

First, it must be noted that the penal statutes prohibiting possession (and use) of "narcotics" have changed substantially in the 17 years since the occurrence of the events in this case. Today, the prohibition in section 11350 of the Health and Safety Code applies to "controlled substances" specified in sections 11054-11058 of said code, California having adopted the Uniform Controlled Substances Act in 1972. The brief recital of the facts gives us no hint or clue as to the "narcotics" which the claimant admitted possessing. There was a time when the term "narcotics" applied to marijuana:

"Section 11500 of the Health and Safety Code forbids the possession of any narcotic

except upon the written prescription of a person licensed to prescribe it. Marijuana is included among narcotics. (Health and Safety Code § 11001h.)" (People v. Rumley (1950), 100 Cal. App. 2d 6)

"On appeal, it is conceded that the Legislature under a proper exercise of its police power may declare the possession or sale of marijuana to be a crime. However, it is urged that the Legislature, by classifying marijuana as a narcotic, was able to obtain public support for the "excessive punishment" it prescribed for the possession or sale of marijuana and that such classification is unreasonable. Stated in another form, defendant urges that the punishment prescribed for the possession or sale of marijuana is excessive because, it is argued, marijuana is not a narcotic.

"Questions of a similar nature have been raised in other jurisdictions and whenever the issue has been presented it has been uniformly held that marijuana is a narcotic drug for purposes of statutory interpretation. (Spence v. Sacks, 173 Ohio St. 419 (183 N.E. 2d 363); People v. Stark, 157 Colo. 59 (400 P. 2d 923); Gonzales v. State, 163 Tex. Crim. Rep. 432 (293 S.W. 2d 786); State v. Jackson, - Del. - (239 A. 2d 215); Commonwealth v. Leis, - Mass. - (243 N.E. 2d 898); Escobio v. State (Fla.) 64 So. 2d 766; United States v. Ford Coupè Automobile, 83 F. Supp. 866.)" (People v. Sheridan (1969), 261 Cal. App. 2d 429.)

Today, under the Uniform Controlled Substance Act (Health and Safety Code section 11000, et seq.) marijuana is neither a "narcotic" nor a "controlled substance," and is instead considered separately (see sections 11357-11362, Health and Safety Code). New laws which became operative January 1, 1976 base the penalty for possession of marijuana for one's use on the weight of the marijuana.

If the claimant had marijuana in his possession, the severity of the offense would be far less harsh today. The significance of the liberalization of the statutes

concerning possession and use of marijuana is spotlighted by Weissbuch v. Board of Medical Examiners (1974), 41 Cal. App. 3d 924. The physician in that case appealed the discipline which the Board of Medical Examiners had ordered. The Board of Medical Examiners on July 26, 1972 had ordered the physician's license revoked, with the order stayed during a two-year probationary period. The physician on January 15, 1971 had pleaded guilty to possession of marijuana. The Court of Appeal ordered the Board of Medical Examiners to dismiss the proceeding, noting that under "present law, this case would not have arisen. In 1972, the Legislature by enactment of the California Uniform Controlled Substances Act, eliminated marijuana as a narcotic from Health and Safety Code section 11001 and its successor section 11019 does not include marijuana as a narcotic, nor is it classified as a dangerous drug." As the change in law had occurred before the Board of Medical Examiners' order became final, the order had to give way to the new statutes.

But, irrespective of the nature of the substance possessed by this calimant in the case presently before us, the decision is also fatally flawed by its lack of syllogistic reasoning. The decision concludes, without citing any specific supportive evidentiary finding, that possession of the "narcotics" away from his work by the pharmacist constitutes misconduct within the meaning of section 1256. Such a conclusion, absent evidence of probative value, is contrary to the recent dismissal law established by the courts of this state. I will set forth several of the leading cases, which enunciate the rules and the tests developed by the courts.

In H. D. Wallace and Associates, Inc. v. Department of Alcoholic Beverage Control (1969), 271 Cal. App. 2d 589, the state had ordered the conditional revocation of the liquor license of the petitioning corporation, because the corporation's president and sole shareholder had had a number of arrests and convictions for misdemeanor drunk driving and other offenses involving the intemperate use of alcoholic beverages. All such incidents occurred away from the licensed premises. The court directed the state to set aside its order of revocation, stating:

"In this case the department apparently believed that Mr. Hughes' past conduct might raise a future probelm. The net effect was

revocation of the license upon conjecture or speculation. There was no evidence that his convictions for insobriety on and off the highway had an actual effect upon the conduct of the licensed business, nor was there any rational relationship between his offenses and the operation of the licensed business in a manner consistent with public welfare and morals. . . ." (271 Cal. App. 2d at pages 593-594.)

The California Supreme Court refined the evidentiary requirement into the "nexus" test in Morrison v. State Board of Education (1969), 1 Cal. 3d 214. The appellant, a public school teacher, had been involved in a non-criminal homosexual relationship with an adult away from the school. The state ordered the appellant's life diplomas revoked on the basis of his conduct. The court overturned that order, pointing out that the record contained no evidence indicating the appellant's unfitness to teach.

Morrison and related cases are collected in the court's opinion in Vielehr v. State Personnel Board (1973), 32 Cal. App. 3d 187, which involved the conviction of possession of marijuana during his off-duty hours by a tax representative trainee of the Department of Human Resources Development (predecessor of today's Employment Development Department). The appellant-trainee was dismissed from his job by reason of the conviction. The department's notice of punitive action stated, inter alia:

" . . . Your position as Tax Representative Trainee requires a great amount of public contact with a segment of the community made up primarily of employers. One of your functions in your position is to establish a rapport with these individuals based on a mutual feeling of respect.

"You are a representative of the Department and any actions which tend to discredit you personally in the eyes of those you come into contact with cannot help but bring discredit to the entire Department.

"The knowing commission of an illegal act without just cause shows a lack of

respect for authority, particularly governmental authority. You cannot urge people to comply with Departmental rules and regulations while you yourself have shown a lack of desire to comply with governmental rules."

The only evidence presented at the appellant's hearing was his conviction. Citing Morrison and Comings v. State Board of Education (1972), 23 Cal. App. 3d 94, the court set forth the rule:

"If the misconduct bears some rational relationship to the employment and is of a character that can reasonably result in the impairment or disruption of . . . service, the employee may be disciplined." (32 Cal. App. 3d, at page 192).

The court at some length explained the requirements, based on the Morrison and Comings decisions:

"In Morrison v. State Board of Education, supra, 1 Cal. 3d 214, the only proof was that the teacher had committed four separate acts of homosexual conduct with a fellow teacher over a period of one week. The court held that the teacher's conduct could not constitute immoral or unprofessional conduct or conduct involving moral turpitude which per se gave grounds to discipline the teacher unless such conduct indicated his unfitness to teach. The court elaborated: 'We therefore conclude that the Board of Education cannot abstractly characterize the conduct in this case as "immoral," "unprofessional," or "involving moral turpitude" within the meaning of section 13202 of the Education Code unless that conduct indicates that the petitioner is unfit to teach. In determining whether the teacher's conduct thus indicates unfitness to teach the board may consider such matters as the likelihood that the conduct may have adversely affected students or fellow teachers, the degree of such adversity anticipated, the proximity or remoteness in time of the conduct, the type of teaching certificate held by the party involved, the

extenuating or aggravating circumstances, if any, surrounding the conduct, the praiseworthiness or blameworthiness of the motives resulting in the conduct, the likelihood of the recurrence of the questioned conduct, and the extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers. These factors are relevant to the extent that they assist the board in determining whether the teacher's fitness to teach, i.e., in determining whether the teacher's future classroom performance and overall impact on his students are likely to meet the board's standards.' "

* * *

"Aside from the fact that Comings v. State Board of Education, supra, 23 Cal. App. 3d 94 (hg. den.) related to teachers and State Board of Education proceedings, the factual situation there was almost identical to that in the case at bench and therefore is of significant precedential value.

"In that case two separate and distinct disciplinary proceedings (Comings and Jones) were consolidated for hearing on appeal because of the questions common to both. In each, there was a conviction for possession of marijuana. In each, punitive action was taken against the teacher by administrators and the action was affirmed by the superior court.

"In the Comings case there had been no evidence produced aside from his conviction of possession of marijuana. The court held that the conviction alone did not constitute substantial evidence of unfitness to teach and reversed the judgment. In doing so, the court said: 'Whether Comings' conduct "adversely affected students or fellow teachers," or in what "degree" . . . , is not even suggested by the record; the latter, in fact, does not show whether or where he taught in a California public school at any

time, thus precluding any inference as to the relevant notoriety of his conduct. No inquiry was made into "extenuating or aggravating circumstances, if any, surrounding the conduct," the likelihood of its recurrence, or Comings' motives. . . . The record contains even less evidence of his "unfitness to teach" than appeared in the record held insufficient in Morrison; it thus falls short of the showing required, under the Morrison test, to support revocation of his certification documents.' (23 Cal. App. 3d at pp. 104-105)

"In the Jones case the judgement dismissing the teacher was affirmed based upon a finding of substantial evidence of his unfitness to teach. The substantial evidence consisted of not only the conviction of possession of marijuana but also the testimony of a vice principal of the school where Jones had been employed. The testimony in substance was that Jones was unfit and included valid reasons for this conclusion."

* * *

"In some factual contexts the obviousness of such relationship is clear. For example, Orlandi v. State Personnel Board, supra, 263 Cal. App. 2d 32 - wherein there was 'ticket fixing' by a California Highway Patrol officer; and Nightingale v. State Personnel Board, supra, 7 Cal. 3d 507 - wherein a referee employed by the Division of Industrial Accidents intervened with other referees and the Attorney General in an effort to obtain special treatment for a friend. In the case at bench, if the appellant had been an officer with the Bureau of Narcotic Enforcement, there could be little question that the conviction of possession of marijuana alone would justify disciplinary action.

"However, there is no such obvious relationship between possessing marijuana off the job and the duties of a tax representative trainee. Under the mandate of

Morrison and the holding in Comings, we are constrained to conclude that conviction of possession of marijuana off the job does not, without more, establish a sufficient probative nexus between the failure of good behavior and a finding of discredit to the agency or employment to justify disciplinary action. Under these authorities, possession of marijuana in private, without more, does not ipso facto cause discredit to the agency for which appellant works or to his employment. Additional proof should be presented bearing upon the relationship between the failure of good behavior and the alleged harm to the public service and whether the failure of good behavior can reasonably result in the impairment or disruption of the public service. Such proof could include, but is not necessarily limited to, whether there are extenuating or aggravating circumstances surrounding the conduct, the likelihood of its recurrence, the proximity or remoteness in time of the conduct, the notoriety of the conduct, and the reasonable likelihood that as a result of the conduct the tax enforcement function of the agency would be impaired." (32 Cal. App. 3d, pp. 192-195. (See Pettit v. State Board of Education (1973), 10 Cal. 3d 29, in which revocation of appellant's life diplomas was sustained, as the evidentiary requirements formulated in Morrison had been satisfied in full.)

I submit that in the pharmacist's case which we have before us, there is a lack of evidence to fulfill the above mandates of the court. Based on the elements set out in Vielehr, only the notoriety is demonstrated, and this alone falls palpably short of an adequate evidentiary showing that the claimant's off-duty conduct constituted misconduct with respect to his job. The majority opinion is replete with conclusions, but just as in the fatally defective orders of the state in H. D. Wallace, Morrison, Comings, and Vielehr, there is no real evidence of probative value to support such conclusions. Consequently, the decision is not sustainable under Code of Civil Procedure section 1094.5 (Perea v. Fales (1974), 39 Cal. App. 3d 939).

If, as in Orlandi or Nightingale, the claimant had been a seller or furnisher of narcotics, or if it had been established that the claimant had been obtaining his supply of narcotics from the employer's stock, misconduct within the meaning of section 1256 would be more readily established. But there is not even a suggestion of any such conduct.

I suggest that, in a case of this nature, the traditional section 1256 tests established in Maywood Glass Company v. Stewart, 170 Cal. App. 2d 719, must be carefully applied, and incorporated therein must be the development of the relationship or "nexus" between the conduct and the claimant's fitness to continue to perform the duties required by the position. I believe the teachings of the decisions by the California Courts require no less. In the instant case, the traditional Maywood syllogism was not even satisfied. That, in and of itself, renders the decision unsound.

HARRY K. GRAFE